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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION.

To the Honorable, the Supreme Court of the United States:

Comes Now petitioner, Alva B. Davis, appellant below, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case.

This is a mail fraud case. On October 3, 1939, appellant, with one L. J. Summerfield, was convicted in the United States District Court for the Northern District of Texas, at Dallas, on all counts, except the fifth, of an indictment containing fourteen counts (R. 60). Thirteen counts charged use of the mails in furtherance of a scheme to defraud (18

U. S. C. A. 338). The fourteenth count charged a conspiracy (18 U. S. C. A. 88) to commit the several substantive offenses outlined in the preceding thirteen counts (R. 1-44). The scheme alleged, in substance, as we understand it, that the defendants would acquire waste lands in Brewster and Presidio counties, Texas, at $1.00 and $1.50 an acre and sell and offer it for sale for $10.00 an acre, and make false representations concerning the lands, and would falsely represent (R. 7 (1)) that the lands were Texas oil lands and valuable Texas ranch properties, when in truth they were not, but were waste lands, unfit for any purpose, which had been acquired for $1.00 and $1.50 an acre and were being sold for $10.00 an acre; and would falsely represent (R. 7 (2)) that the sale of the lands carried with it all surface and mineral rights, when in truth the mineral rights to many tracts had been reserved and were held by the State of Texas; and would falsely represent (R. 7 (3)) that the lands were well worth the price the purchasers were paying for it, $10.00 an acre, and that extensive oil development was under way in Brewster and Presidio counties, when in truth the land was worthless as an investment and there was no development of any character in the area in which the land was situated, and there was no justification in the claim that the land was worth the price the purchaser was paying for it, $10.00 an acre, but on the contrary, the land was hilly, waste land which had been purchased shortly prior thereto at $1.00 and $1.50 an acre; and would falsely represent (R. 8 (4)) that the land was highly productive and suitable for the growing of various crops and fruits, when it was not, but on the contrary, the lands were absolutely barren and would not produce any character of vegetation, and that the lands (R. 9) were worthless as a basis for investment, as the defendants well knew; and that the defendants were not conducting and would not conduct a business and enterprise in good faith, but on the contrary, were

knowingly conducting a mere dishonest and fraudulent land selling scheme and were engaged in practices and a course of business which would and did operate as a fraud and deceit upon the persons to be defrauded. It was alleged that there were other misrepresentations made, such as the identity of the officers of the organization. There was a single fraudulent scheme charged; each of the thirteen counts merely involved the mailing of a different letter. The first count was based upon a letter to Walter L. Bryan, Drew, Mississippi. The second count involved the mailing of a letter to Mrs. Nora M. H. Hartman, Troy, Kansas. The third count involved the mailing of another letter to Mrs. Hartman. The fourth count involved the mailing of another letter to Mrs. Hartman. The fifth count involved the mailing of a letter to Miss Sadie M. Huber, Hamilton, Ohio. She was not used as a witness and petitioner was acquitted of that count. The sixth count involved the mailing of a letter to Emil Kollert, Royal Oak, Michigan. The seventh count involved the mailing of another letter to Kollert. The eighth count involved the mailing of a letter to George Roulet, New Iberia, Louisiana. The ninth count involved the mailing of a letter to W. M. Springer, Clarksdale, Mississippi. The tenth, eleventh, twelfth and thirteenth counts involved the mailing of four different letters to Mrs. Agnes Schrader, New York. The fourteenth count is the conspiracy count.

The indictment was returned on September 21, 1939 (R. 44). Defendant was arraigned on September 23, and the case was set down for trial September 27, 1939. We did not participate in the trial of the case and assume that the recitations in the record are true.

On the 23rd day of September, 1939, defendant filed a motion for continuance, alleging, among other things, that because of the nature and extent of the charges in the in-

dictment, he could not properly prepare for trial within the time allowed and that, in order to properly make his defense, it would be necessary for him to summon witnesses and that he was not able to procure such witnesses at the term (R. 54). The motion was overruled (R. 57). Later the case was reset for October 2, 1939, and although it does not appear in the bill of exceptions, it was alleged in his notice of appeal (R. 63) and in the assignments of error (R. 92 & 93) that on that date the defendant renewed his motion for continuance supplementing it with allegations that he had caused subpoenas to be issued to several named witnesses and that the United States Marshal made diligent effort to secure said witnesses but was informed that the parties sought were temporarily out of the city. He alleged that these absent witnesses had been his agents in selling the lands and that they would, if present, testify that they were acquainted with the instructions given by petitioner to his agents, and that it was his policy to always instruct his agents never to misrepresent the value, location and prospects of the land sold; that he could not safely go to trial without said witnesses, and that he had no other witnesses present for the trial by whom he might make this proof; and that the motion was overruled (R. 93). The petitioner was put to trial on October 2, 1939 (R. 97).

The case was tried before the Honorable William H. Atwell, sitting without a jury, and, upon conviction, the petitioner was sentenced to two years in the penitentiary and to pay a fine of $5,000.00 (R. 68).

Statement as to Jurisdiction.

Petitioner appealed from the judgment of conviction to the Circuit Court of Appeals for the Fifth Circuit and that court on June 8, 1940, affirmed the judgment of the trial court, and on August 2, 1940, denied, without opinion, petition for rehearing (R. 563).

Jurisdiction of this cause is conferred upon the Supreme Court by Section 347a, U. S. C. A., Title 28. The opinion of the Circuit Court of Appeals appears in the Appendix.

Questions Presented.

1. *Whether the trial court abused its discretion in overruling petitioner's motion for continuance and putting him to trial in eleven days after indictment, at a time when he was unable to procure the attendance of witnesses he relied upon to assist in establishing his good faith in connection with the sale of his lands.*

This was assigned as error below (R. 89-93) and argued (appellant's brief, pp. 63 & 64). This was one of the errors assigned which the Circuit Court of Appeals characterized as purely technical and not affecting appellant's rights, and without merit.

2. *Whether the Circuit Court of Appeals deprived petitioner of his right to a review by failing or refusing to examine the record to determine whether there was any evidence to support the conviction.* In this connection, petitioner desires to point out that in the opinion the Circuit Court said:

> "The printed record consists of some 550 pages, but we will not attempt to review the evidence as it is not suggested it was insufficient to support the conviction. The errors assigned are purely technical and do not affect the substantial rights of appellant. Furthermore, they are without merit.
>
> The record presents no reversible error. 28 U. S. C. A. § 391."

Petitioner is unable to determine from this language whether the court meant to say that it had not examined the record to determine whether there was evidence to support the judgment, or that it had examined the record and

found evidence to support the judgment. The insufficiency of the evidence was urged in the brief as Point 9 of "Points Relied Upon" (appellant's brief, pp. 26 & 27), and argued (pp. 69 & 70). It is true that a complaint as to the insufficiency of the evidence was not included in the "Assignments of Error". In petitioner's petition for rehearing he called the court's attention to the fact that he did claim, in presenting his appeal, the evidence to be insufficient (Par. 3, petition for rehearing, R. 560), and specifically pointed out wherein there was no evidence (R. 560-561). The court denied the petition without comment. If the court, by the quoted part of the opinion above, said or meant to say that it did not review the evidence because it was not suggested it was insufficient to support the conviction, it erred to the prejudice of petitioner and deprived him of his right of review.

3. *Whether there was any evidence to support the conviction.* Specifically, petitioner contends: (a) That the essence of the indictment was that the defendants would sell waste lands by means of false representations, and there was not a scintilla of evidence that any of the lands sold or offered for sale were waste lands, no one testified and there was no other evidence offered showing or tending to show the location, value or character of any land sold or offered for sale. (b) That the substantial misrepresentations charged in the indictment were, (1) that the lands were Texas oil lands and valuable Texas ranch properties, whereas, the indictment charged, they were waste lands, unfit for any purpose; (2) that the sale of the lands carried with it all surface and mineral rights, whereas, the indictment charged, the mineral rights to many tracts had been reserved and were held by the State of Texas; (3) that the lands were well worth what the purchasers were paying for them, and that extensive oil development was under way in Brewster and Presidio counties, whereas the

indictment charged, the land was worthless as an investment and there was no development of any character in the area in which the land was situated, that there was no justification in the representation that the lands were worth the price the purchasers were paying for it, because the land was hilly, waste land; (4) that the lands were highly productive and suitable for the growing of various crops and fruits, whereas, the indictment charged, the lands were absolutely barren and would not produce any character of vegetation. There was no evidence offered which showed or tended to show that any of the above representations were false as charged. (c) There is no evidence in this record that petitioner authorized the agent, Summerfield, or any other person, to make the false representations as to the lands being highly productive and suitable for various crops and fruits, and that purchasers would receive quick and substantial profits upon their investments, and that there were prospects for enormous dividends and profits. If the Circuit Court of Appeals by the quoted part of the opinion above said or meant to say that it had examined the record and found evidence to support the conviction, it erred to the prejudice of petitioner, because there is no evidence in the record to support the charge as made.

Reasons Relied Upon for the Allowance of the Writ.

1. In holding that petitioner's assignment of error as to the action of the trial court in overruling his motion for continuance was purely technical and did not affect any of petitioner's substantial rights, the Circuit Court of Appeals decided an important question in the administration of federal criminal justice in a way in conflict with the applicable decisions of the Supreme Court, and particularly in conflict with the decision in *Bruno* vs. *United States*, 84 L. Ed. 158, Advance Opinion No. 3, October Term, 1939.

2. In holding that there was no merit in petitioner's complaint as to the action of the trial court in overruling his motion for continuance, the Circuit Court of Appeals sanctioned a clear abuse of discretion by the trial court, which seriously infringed petitioner's right to a fair trial and an opportunity to present his defense, and decided an important question of general law in a way untenable and in conflict with the weight of authority. Cf. *Younge* vs. *United States,* 223 Fed. 941; *Paoni* vs. *United States,* 281 Fed. 801. And see *C. J. S. Continuances,* § 46; *U. S.* vs. *Phelps,* 8 Pet. (U. S.) 700, 8 L. Ed. 1094; 12 *Am. Jur. Continuances,* § 23.

3. In holding that petitioner did not question the sufficiency of the evidence to support the conviction and refusing to review the evidence, the Circuit Court of Appeals deprived petitioner of a valuable right of review, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

4. In holding, if indeed it has held, that the evidence was sufficient to support the judgment of conviction, the Circuit Court of Appeals has sanctioned a deprivation of petitioner's liberty and property without due process of law, and has sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 9293, *Alva B. Davis* vs. *United States of America,* and that the judgments of the Circuit

Court of Appeals and of the District Court may be reversed; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted.

W. B. HARRELL,
Attorney for Petitioner.